IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1828 OF 1999

M/s.Sun Export (International) Private Limited, a Company incorporated under the Companies Act, 1956, through its Division M/s.Sun Export Corporation, having its Registered Office at 41/42, Atlanta, 205, Nariman Point, Mumbai - 400 021. .. Petitioner.

V/s.

1. Union of India (through the Ministry of Law, Justice and Company Affairs, Aayakar Bhavan, M.K. Road, Churchgate Mumbai - 400 020.

2. The Commissioner of Customs (Adjudication) having its office at 2nd Floor, main building, New Custom House Ballard Estate, Mumbai 38.

3. The Asstt. Commissioner of Customs, Appraising Group IV having his Office at New Custom House, Ballard Estate, Mumbai - 400 038 .. Respondents.

Mr.M.R. Baya i/b. Mr.M.G. Gawade for the petitioner.

Mr.S.M. Shah with Mrs.N.V. Masurkar for the respondents.

CORAM : R.M. LODHA &
J.P. DEVADHAR, JJ.

DATED : 2ND MAY, 2006.

ORAL JUDGMENT (Per R.M. Lodha, J.) :

. The petitioner is a company incorporated under the Companies Act, 1956. The company carries

on business of import and export of different items. It is a Government recognised Export House.

2. By the present petition, the petitioner seeks to challenge the communication dated 5th April, 1999 whereby the Office of the Commissioner of Customs (Adjudication) informed the petitioner that the certificate in form 2B dated 16th February, 1999 is cancelled. The petitioner also challenges the communication dated 1st June, 1999 sent by the Assistant Commissioner of Customs, Appraising Group IV, New Custom House, Ballard Estate, Mumbai 38 asking the petitioner to pay the disputed amount of Rs.16,23,915/- with interest at the rate of 24% per annum.

3. The controversy arises from the following facts. The petitioner imported nine consignments of Stainless Steel Re-rollable Scrap. In respect of each of the nine consignments, the petitioner filed bill of entry. Each of the bills of entry was taken up for assessment. The petitioner claimed classification of the said goods under heading 73.03/05 of the first scheme to the Customs Tariff Act, 1975. The proper officer assessed the said goods under heading 73.15(2) and demanded duty accordingly. At the relevant time, duty under

heading 73.02/05 was 30% ad-valorem when read along with the Notification No.151/77-Cus while the duty under heading 73.15(2) was 225%. That led the petitioner in filing writ petition in the Delhi High Court. By an interim order dated 22nd January, 1982, the Delhi High Court directed the respondents to allow the petitioner to clear the goods on furnishing bond for the disputed amount of duty of customs and bank guarantee for 50% of the disputed amount.

4. On 1st September, 1998, vide Finance (No.2) Act, 1998, Kar Vivad Samadhan Scheme, 1998 (for short 'KVSS') came into force which remained operative until 31st January, 1999. The petitioner filed declaration within time under the said KVSS. The said declaration was accepted and the Designated Authority passed an order under sub-section 1 of Section 90 directing the petitioner to pay 50% of the disputed amount within 30 days therefrom. The certificate issued under rule (b) in Form 2B of KVSS and Kar Vivad Samadhan Scheme Rules, 1998 reads thus:

"THE FINANCE (NO.2) ACT, 1998 IN RESPECT OF
KAR VIVAD SAMADHAN SCHEME, 1998.

KAR VIVAD SAMADHAN SCHEME RULES, 1998.
FORM 2B
[See Rule 4(b)]

Whereas M/s.Sun Exports Corporation (hereinafter referred to as the 'declarant') has filed a declaration under Section 88 of the Finance (No.2) Act, 1998; and whereas the said declaration has been

received on 30/12/98 in the office of the designated authority.

Now, therefore, in exercise of the powers conferred by Sub-section (1) of Section 90 of the Finance (No.2) Act, 1998, the designated authority, after consideration of relevant material, hereby determine the following amount payable the declarant towards full and final settlement of his/her/their tax arrears covered by the said declaration under the scheme.

Tax Arrears	Amount of tax arrears declared in Form 1B	Amt.Determined as payable under Sec.88(F) of the Finance (No.2) Act, 1998.	Remarks
	(In Rs.)	(In Rs.)	
(a) Duties			
Declared Amount	Rs.16,23,916/- (Rs.Sixteen Lakhs Twenty Three Thousand Nine Hundred Sixtee only)		
Correct Amount	Rs.32,47,832/- (Rs.Thirty Two Lakhs Fourty Seven Thousand Eight Hundred Thirty One Only)	Rs.16,23,916/- (Rs.Sixteen Lakhs Twenty Three Thousand Nine Hundred Sixteen Only)	
(b) Other than duties			

The declarant is hereby directed to make payment of the sum payable within 30 days of the date of this certificate.

F.No.MCH/KVSS-197/98

(sd/-)

Place : Mumbai

(K.D. Mankar)
Commissioner of Customs
(Adjudication) &
Designated Authority
KVSS 98."

Date : 16.2.99

5. The petitioner made payment of Rs.16,23,916/- as per the certificate dated 16th February, 1999. However, on 5th April, 1999, the petitioner received

the following communication.

"OFFICE OF THE COMMISSIONER OF CUSTOMS (ADJUDICATION)
2ND FLOOR, MAIN BLDG., NEW CUSTOM HOUSE,
BALLARD ESTATE, MUMBAI - 400 038.

F.No.MCH/KVSS-197/98 Date : 5.4.99

To,

M/s.Sun Export Corporation,
41/42, Atlanta,
Nariman Point,
Mumbai - 400 021.

Sub : Your declaration under KAR VIVAD SAMADHAN SCHEME 1998 - RUNNING SR.NO.00360 DT.30.12.98 REG.

Gentlemen,

. Please refer to your aforementioned declaration under KAR VIVAD SAMADHAN SCHEME - 1998, certificate in Form 2B dated 16.02.99 issued by the undersigned and the payment of the amount of Rs.16,23,916/- in terms of the said certificate.

. On further scrutiny of the said declaration, it is revealed that, the aforesaid declaration is not eligible for considering settlement under the KVSS 98, for the reason that no evidence is forthcoming on record to indicate that a show cause notice or demand notice has been issued to you. The declaration is therefore, ineligible in terms of provisions contained in Section 95(ii)(b) of the Finance (No.2) Act, 1998.

. In view of the aforesaid, your aforesaid declaration is rejected.

Yours faithfully,
sd/-
(K.D. Mankar)
Commissioner of Customs (Adjudication)
Designated Authority (KVSS-98) Mumbai."

6. It is this communication which is impugned in the present writ petition as noticed above and the subsequent communication dated 1st June, 1999 asking

the petitioner to pay the disputed amount of Rs.16,23,916/- with interest.

7. The tax arrear in relation to indirect tax enactment under Section 87(m)(ii) of KVSS reads thus:

> "87. ----------
>
> (m) "tax arrear" means -
>
> (i) ----------
>
> (ii) in relation to indirect tax enactment, -
>
> (a) the amount of duties (including drawback of duty, credit of duty or any amount representing duty), cesses, interest, fine or penalty determined as due or payable under that enactment as on the 31xst day of March, 1998 but remaining unpaid as on the date of making a declaration under section 88; or
>
> (b) the amount of duties (including drawback of duty, credit of duty or any amount representing duty), cesses, interest, fine or penalty which constitutes the subject matter of a demand notice or a show-cause notice issued on or before the 31st day of March, 1998 under that enactment but remaining unpaid on the date of making a declaration under section 88,
>
> but does not include any demand relating to erroneous refund and where a show-cause notice is issued to the declarant in respect of seizure of goods and demand of duties, the tax arrear shall not include the duties on such seized goods where such duties on the seized goods have not been quantified.

Explanation. - Where a declarant has already paid either voluntarily or under protest, any amount of duties, cesses, interest, fine or penalty specified in his sub-clause, on or before the date of making a declaration by him under section 88 which includes any deposit made by him pending any appeal or in pursuance of a court order in relation to such duties, cesses, interest, fine or penalty, such payment shall not be deemed to be the amount unpaid for the purposes of determining tax arrear under thus sub-clause;

8. Section 90 provides time and manner of payment of tax arrear, thus :

"90. (1) Within sixty days from the date of receipt of the declaration under section 91, the designated authority shall, by order, determine the amount payable by the declarant in accordance with the provisions of this Scheme and grant a certificate in such form as may be prescribed to the declarant setting forth therein the particulars of the tax arrear and the sum payable after such determination towards full and final settlement of tax arrears :

Provided that where any material particular furnished in the declaration is found to be false, by the designated authority at any stage, it shall be presumed as if the declaration was never made and all the consequences under the direct tax enactment or indirect tax enactment under which the proceedings against the declarant are or were pending shall be deemed to have been revived:

Provided further that the designated authority may amend the certificate for reasons to be recorded in writing.

(2) The declarant shall pay, the sum determined by the designated authority within thirty days of the passing of an order by the designated authority and intimate the fact of such payment to the designated authority

> along with proof thereof and the designated authority shall thereupon issue the certificate to the declarant.
>
> (3) Every order passed under sub-section (1), determining the sum payable under this Scheme, shall be conclusive as to the matters stated therein and no matter covered by such order shall be reopened in any other proceeding under the direct tax enactment or under any other law for the time being in force.
>
> (4) ----------"

9. The certificate that has been issued on 16th February, 1999 as reproduced above is under Rule 4(b) in Form 2B of KVSS Rules, 1998 is conclusive and cannot be reopened by virtue of sub-section (3) of Section 90. As a matter of fact, Mr.S.M. Shah, was quite fair in stating that the certificate in form 2B is not revokable and the Commissioner of Customs (Adjudication) exceeded its authority in sending communication dated 5th April, 1999 to the petitioner that they were ineligible for settlement under KVSS, 1998.

10. We have no hesitation in holding that the communication dated 5th April, 1999 sent by the Commissioner of Customs (Adjudication) to the petitioner is beyond his power, competence, jurisdiction as he has re-opened the matter which had become conclusive under Section 90(3) by virtue of the order passed under sub-section (1) of Section 90

and certificate issued under rule 4(b) in form 2B. The subsequent communication dated 1st June, 1999 asking the petitioner to pay the disputed amount of Rs.16,23,915/- is also rendered unauthorised as the very basis for issuing such demand has been found by us beyond the authority.

11. The result is that we allow the writ petition and quash and set aside the communication dated 5th April, 1999 (Exhibit 'G') and the communication dated 1st June, 1999 (Exhibit 'H'). Parties are directed to bear their own costs.

(R.M. LODHA, J.)

(J.P. DEVADHAR, J.)